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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1961

No. 334

ALFRED J. HEINECKE, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Alfred J. Heinecke, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above cause on July 27, 1961.

Citations to the Opinions Below

On the 27th day of July, 1961, the United States Court of Appeals for the District of Columbia Circuit, issued its decision and opinion affirming Petitioner's conviction by the United States District Court for the District of Columbia, on January 27, 1961, in Criminal Case Number 1023-60. The case number in the United States Court of Appeals was 16194. (A-) (Record, p.). Said Petitioner was convicted on twenty-six

counts for violations of Title 18 U.S. Code Section 1461 (1958), one count for violation of 18 U.S. Code Section 371 (1958) and one count for violation of 22 D. C. Code Section 2001 (1951).

Jurisdictional Statement

The petitioner was indicted in a thirty-five count indictment for alleged violations of Title 18 U.S.C. Section 1461. Title 18 U.S. Code Section 371 and Title 22 D. C. Code Section 2001 in that in sixteen counts petitioner was charged with knowingly distributing circulars through the mails giving information where, how and from whom and by what means obscene materials could be obtained and in sixteen counts petitioner was charged with knowingly sending through the mails obscene material, namely the same advertisements involved in the alternate counts and in one count with conspiracy to violate the obscenity statutes and in one count with printing of obscene matter.

The United States District Court for the District of Columbia had jurisdiction over this case. The decision and judgment of the United States Court of Appeals for the District of Columbia Circuit was entered July 27, 1961. The jurisdiction of this Honorable Court is invoked under 28 U.S.C. Section 1254.

Statement of Questions Presented

The questions presented by this Petition are:

1. Whether the District Court erred in instructing the jurors that the alleged obscene material at issue was "obscene in the eyes of the law," amounting to a directed verdict of guilty, denying petitioner a fair trial in violation of Amendments V, VI, Constitution of the United States of America.

2. Whether the District Court erred in failing to suppress certain evidence at pre-trial motion and admitting said matter into evidence over the petitioner's objection, and in refusing to allow the petitioner to introduce evidence to prove there was no probable cause for issuance of a search warrant of the petitioner's home where said evidence was seized, in violation of Amendment IV, Constitution of the United States of America.

3. Whether the District Court erred in failing to allow the petitioner to prove to the jury what matter would constitute "contemporary community standards" in the District of Columbia, when the petitioner offered in evidence a collection of art instruction books, comparable and similar to the petitioner's books at issue, and in unquestioned circulation in the District of Columbia, which the government contended were obscene; and collections of nudist magazines and periodicals for sale and available at news-stands in the District of Columbia and through the United States mails, which the Supreme Court of the United States has held to be not obscene and mailable, such as copies of Sunshine and Health Magazine; all of which materials the petitioner offered through the testimony of a qualified psychologist, whom the District Court refused to qualify as an expert in the field of "contemporary community standards" even though said expert had written several books and papers on that particular topic, and had devoted his entire professional career to a study of such matters. The material offered by the petitioner and rejected by the District Court was essential for the jury to properly decide the question of whether or not the petitioner's materials offered by the government and accepted in evidence were obscene under the test set forth by this Court in the case of Roth v. United States, 354 U.S. 476, denying petitioner a fair trial in violation of Amendments V, VI, Constitution of the United States of America.

4. Whether the petitioner was denied by the United States District Court for the District of Columbia, a fair trial as constitutionally provided in the Fifth and Sixth Amendments of the Constitution of the United States of America, and the protection of the First Amendment to the Constitution of the United States of America because the District Court refused to allow the petitioner in any way to defend his books which the government alleged to be obscene by refusing to allow qualified artists to demonstrate the uses for petitioner's books at issue; and by insulting petitioner's expert witness, resulting in said witness, an ordained Minister of the Gospel, refusing to testify any further, and in refusing to instruct the jurors that the effect of the petitioner's material in evidence upon children or particularly susceptible groups is not decisive, and, in refusing to instruct the jurors that the petitioner's materials must be judged in relation to the normal adult reader and

in instructing the jurors that petitioner's photographic illustrations were seemingly depicted in lewd and lascivious positions with emphasis on the genital regions advocating the government's position and in instructing the jury that the petitioner could be convicted, even though petitioner believed the matter he placed in the mail was not obscene and even though petitioner acted upon advice of legal counsel that his actions in that regard were legal and in refusing to permit the petitioner to prove that his actions were legitimate and that his customers were persons having legitimate use for his materials and in refusing to instruct the jurors that if the petitioner's books expressed a thought or idea containing the slightest amount of socially redeeming value they were not obscene.

5. Whether the District Court erred in refusing petitioner's motion for judgment of acquittal on all alternate substantive counts of the indictment in that each envelope and contents could only constitute one violation of Title 18 U.S.C. sec. 1461, whereas the government contended in each alternate substantive count of the indictment, one envelope and contents constituted two different violations of Title 18 U.S.C. sec. 1461.

Statutes and Rules Involved

The pertinent statutes are Amendments I, IV, V and VI of the Constitution of the United States. (App. 6a)

Title 18 U.S. Code Section 1461 (1958) (App. 7a)
Title 18 U.S. Code Section 371 (1958) (App. 8a)
Title 22 D. C. Code Section 2001 (1951) (App. 8a)

Statement of the Case

Petitioner was charged by indictment with violation of Title 18 U.S. Code Section 371, in that it was alleged he conspired, with another, to violate Title 18 U.S.C. 1461 and in 16 substantive counts with violation of Title 18 U.S.C. 1461, by sending advertisements through the mail giving information, where, how, and from whom and by what means obscene matter may be obtained, and in 16 substantive counts, with using the mails for transmitting obscene matter which was the same advertising material involved in the alternate counts, and in one count with causing to be printed in the District of Columbia advertisements stating by what means obscene books may be obtained.

The petitioner entered a plea of not guilty to the indictment on December 13, 1960. At the conclusion of all the evidence, the jury found the petitioner guilty and convicted him on 28 of the counts against him, six counts having been abandoned by the government during trial; the jury's verdict being returned on January 23, 1961. Thereafter, on January 27, 1961, judgment and sentence was pronounced by the United States District Court for the District of Columbia, whereby petitioner was committed to the custody of the Attorney General for a period of 15 months to 45 months. Petitioner's conviction was affirmed by the United States Circuit Court of Appeals for the District of Columbia on July 27, 1961. The following statement summarizes the proceedings in the Trial Court:

On December 7, 1960, United States Postal Inspector Fay conducted a search of the petitioner's premises in Lakewood, New Jersey, pursuant to search warrant issued by the United States Commissioner in that District (J.A. 247 through 252). The United States Marshal, Buxo, executed the search warrant and while at the petitioner's premises obtained information for the application for a second search warrant of the petitioner's premises from the same United States Commissioner (J.A. 247 through 252) which search warrant was executed the same day. At both searches of the petitioner's premises, all of the petitioner's property was seized (J.A. 54, 55). There was no attempt to arrest the petitioner on those occasions although petitioner was physically present at both searches. Petitioner surrendered himself in the District of Columbia on December 13, 1960, and entered a plea of not guilty to the indictment on that day. The indictment was not returned by the grand jury until December 8, 1960. Petitioner filed a motion to suppress evidence (J.A. 14, 15), which was denied by the United States District Court for the District of Columbia, per Judge Holtzoff on December 22, 1960. Petitioner was prevented from showing a lack of probable cause for the issuance of the first search warrant at the hearing before Judge Holtzoff (J.A. 18 through 24), and at the trial of the case before the same Judge (J.A. 58, 115 through 117, 178; Defendant's Exhibit for Identification No. 9). Had petitioner been allowed to prove his point, he would have shown that the Postal Inspector, Fay, had no personal knowledge of contents of

petitioner's premises at the time of obtaining the first search warrant, but based his information in the application, and affidavit in support of the first search warrant, upon information over one year old, which was the subject for a prior search of the petitioner's premises. Petitioner was tried before Judge Holtzoff, and a jury from January 10, 1961, through January 23, 1961. Government witnesses testified and petitioner testified in his own behalf; and presented five other witnesses.

The Court accepted in evidence materials which were not mailed from the District of Columbia, but were mailed outside of the District Court's jurisdiction and which were mailed prior to the date of the alleged conspiracy (J.A. 30 through 41, 51, 59, and 172 through 178).

The Court below refused to allow petitioner to introduce any evidence of what matter would constitute "contemporary community standards" in the District of Columbia, even though petitioner offered in evidence material comparable and similar to the petitioner's books at issue (J.A. 78 through 82; 161; Deft. Ex. for Iden. Nos. 3, 4, 5, 6, 7, 8A through 8H), all of which material offered and excluded being in unquestioned circulation in the District of Columbia (J.A. 78 through 82), which materials were offered through the testimony of a qualified witness (J.A. 67 through 72). The petitioner attempted to defend his books at issue through other witnesses, but was prevented from doing so, by the Court (J.A. 101 through 106, 120 through 128, 156 through 165), and the Court insulted one of the petitioner's expert witnesses (J.A. 104, 107 through 115), an ordained Minister of the Gospel, causing said expert witness to refuse to testify any further at the trial. The Court refused to permit the petitioner to prove that he was engaged in legitimate enterprise (J.A. 81, 82, 179 through 181; Dft. Ex. for Iden. 11, 12A through 12H). The Court, in instructing the jury, advocated the government's position (J.A. 230, 243) and in effect, directed a verdict of guilty against the petitioner (J.A. 220 and 234), and denied petitioner's requests for instructions which followed the opinion of this Court in Roth v. United States (J.A. 219, 221, 222, 224, 225, 243, 244). The Court denied petitioner's motions for judgment of acquittal made at the close of the Government's case, and renewed at the close of all of the testimony (J.A. 66, 67, 218, 220, 223). The Court instructed the jurors that the petitioner's intent was immaterial (J.A. 232).

Reasons for Allowing the Writ

I

Petitioner asserts to this Court that he did not receive a fair trial in the District Court below and as his primary point asserts that the Court below in effect directed the jurors to return a verdict of guilty (J.A. 220 234). The Court below was apparently relying upon Horning v. District of Columbia 254 U.S. 135 (J.A. 83). In the case at bar distinguished from the Horning case the facts for the jurors to decide were not uncontradicted. Petitioner introduced two expert witnesses who testified that in their opinion petitioner's materials would not appeal to the prurient interests of the average member of the community (J.A. 74 through 96. 128 through 145). This, of course, raises an issue of fact for the jurors to decide. This, alone petitioner argues constituted reversible error. This Court stated in the case of United States v. Brotherhood of Carpenters 330 U.S. 395, through Justice Reed, at page 408:

> "For a judge may not direct a verdict of guilty no matter how conclusive the evidence."

The footnotes to that case, at page 407, footnote 19, contains the excerpts from the trial judge's charge to the jury therein. Petitioner argues that the charge to the jury therein was weaker for the Government than the charge given the jurors in this case at bar. This Court in the case of Murdock v. United States, 290 U.S. 389, through Justice Roberts, quoted from the Trial Court's charge to the jury at page 393:

> "So far as the facts are concerned in this case, gentlemen of the jury, I want to instruct you that whatever the Court may say as to the facts, is only the Court's view. You are at liberty to entirely disregard it. The Court feels from the evidence in this case that the Government has sustained the burden cast upon it by the law and has proved that this defendant is guilty as charged beyond a reasonable doubt."

At page 394, this Court observed this charge was reversible error, in the following language, distinguishing the Horning decision, which should be limited to a situation where all facts are uncontradicted and unquestioned.

"In the circumstances, we think the Trial Judge erred in stating the opinion that the respondent was guilty beyond a reasonable doubt. A Federal Judge may analyze the evidence, comment upon it, and express his views with regard to the testimony of witnesses. He may advise the jury in respect of the facts, but the decision of issues of fact must be fairly left to the jury. Patton v. U.S., 281 U.S. 276, 288; Quercia v. U.S., 289 U.S. 466. Although the power of the judge to express an opinion as to the guilt of the defendant exists, it should be exercised cautiously and only in exceptional cases. Such an expression of opinion was held not to warrant a reversal where upon the undisputed and admitted facts the defendant's voluntary conduct amounted to the commission of the crime defined by the statute. Horning v. District of Columbia, 254 U.S. 135."

In a more recent decision from the Third Circuit, in 1948, Circuit Judge McLaughlin, in the case of United States v. Gollin, 166 F.2d 123 at page 127, made the following observations.

"The District Judge was without power to direct a verdict of guilty although no fact might have been in dispute. Sparf and Hansen v. U.S., 156 U.S. 51, 105, 15 S.Ct. 273, 39 L.Ed. 343; United States v. Taylor, C.C. 11 F.470; Atchison T. & S.F. Ry. Co. v. United States, 7 Cir., 172 F.194, 27 L.R.A., N.S. 756. And what the judge is forbidden to do directly he may not do by indirection. Peterson v. U.S., 9 Cir. 213 F.920. The situation confronting us goes further than the facts in Dinger v. United States, 8 Cir., 28 F.2d 548. There, as here, the defendant had not taken the stand and the only evidence in the matter was that of the government. The Circuit Court of Appeals, in reversing, construed the District Court's charge as directing the jury to believe the government witnesses and then instructing them if they did believe the government witnesses they must find the defendant guilty. Regarding this, the Court

said at page 551 of 28 F.2d: 'This was tantamount to a direction to convict, which is not permissible in a criminal case.' "

Petitioner argues to this Court that there was a greater factual issue to be decided by the jury in our case at bar than in the Gollin case. Petitioner argues further that the Trial Court could not cure its error by informing the jurors that they are not controlled by the Court's observations and in support of this argument, petitioner refers to Sullivan v. United States, 178 F.2d 723, 85 U.S. App. D.C. 409, where Circuit Judge Proctor, at page 411, made the following observation:

"The expression of such an opinion goes beyond the privilege of a judge to comment fairly on the facts. Comment upon evidence must be distinguished from expression of an opinion upon an ultimate issue determinative of guilt or innocence. The ill effect cannot be offset by instructing the jurors that the court's opinion is not binding on them and that they are the sole judges of the facts. Fryer v. U.S., 7 Cir. 1926, 11 F.2d 707, 708. We think as did this court in Smith v. U.S., 1924, 55 App. D.C. 117, 2 F.2d 919, 921, that such statements have little, if any, tendency to undo the harm already done. The influence of the trial judge on the jury is of great weight, and his lightest word or intimation is received with deference and may prove controlling. Quercia v. U.S., 1933, 289 U.S. 466, 470, 53 S.Ct. 698, 77 L.Ed. 1321. That is especially so in a criminal trial. The damaging influence is more likely where conflicting evidence on a crucial issue leaves the outcome close, as it might have been in this case."

Presuming that the Trial Court was of the opinion that no reasonable men could differ in their opinion of the obscenity of the petitioner's books, the petitioner was constitutionally entitled to have the jury make that final decision without the Court's indulging in advocacy for the government and without the Court's coercing the jurors into reaching the decision the Court desires.

The Circuit Court of Appeals for the District of Columbia, in affirming used the following language:

> "We disapprove the challenged statement but do not think it constitutes such a trial imperfection, considering the charges as a whole, as calls for reversal. The charge of the judge left the issue of obscenity for the jury to decide. The jury was emphatically instructed, both before and after the remark, that obscenity was a matter for their determination, and that, while the judge might comment on the evidence his comments or opinions were in no way binding on the jury."

In footnote two that Court observed that the District Court's charge did not go to the ultimate issue of guilt but only on the issue of obscenity. Petitioner argues to this Court that the only issue for the jury's consideration was that of guilt or innocence being synonymous with obscenity or non-obscenity, since all other facts were admitted. If the books at issue are obscene the petitioner is guilty of mailing obscene materials. If the books at issue are not obscene the petitioner is innocent of mailing obscene materials. And further, if the books at issue are obscene that the petitioner is constitutionally entitled to a fair trial in which the Government must prove his guilt beyond a reasonable doubt without the trial judge leading the jurors into their verdict.

II

Petitioner filed pre-trial motion to suppress evidence, all of which materials were petitioner's property, seized from his home on December 7, 1960 (J.A. 14). There were two search warrants issued and executed on the same day. The information comprising the basis of the affidavit supporting the second search warrant was obtained while the officers were executing the first search warrant (J.A. 53). The affidavit in support of the first search warrant (J.A. 249), did not state information sufficient to give probable cause for the search of the petitioner's home. The affidavit, on its face, shows that the Postal Inspector had information only regarding petitioner's Post Office box at the Lakewood Post Office, but had no information as to the content of petitioner's home where the search was made and where the warrant directed the search to be made. Further, the peti-

tioner was not permitted to show that the information of which the postal inspector had personal knowledge was information obtained over one year prior to obtaining the warrant (Dft. Ex. No. 9; J.A. 18 through 24, 58, 115 through 117, 178), and that the postal inspector had no knowledge of any materials contained in the petitioner's home on the date of executing the affidavit in support of the search warrant. This warrant, on its face, was not sufficient under the decision of this Court in Giordenello v. United States, 357 U.S. 480.

In addition thereto, petitioner asserts that the search of his premises was evidentiary and unreasonable. As authority therefore, petitioner cites United States v. Lefkowitz, 285 U.S. 452; United States v. Go-Bart Co., 282 U.S. 344; United States v. Gouled, 255 U.S. 298; United States v. Morrison, 262 F.2d 449. The Court will please note that the investigation of the appellant had been in process for approximately five months prior to the search of his home and though the case was pending before the grand jury of the United States District Court for the District of Columbia for an extended period of time, the indictment was not returned until after the search and seizure of the evidentiary materials was accomplished. The second search of the petitioner's premises based upon information received while the searching officers were in the petitioner's premises pursuant to the first search warrant, cannot be sustained if the first search warrant was unlawful and illegal. Appellant relies upon Hair v. United States, U.S. App. D.C., No. 15,878, and Burrows v. United States, U.S. App. D.C., No. 15,890, decided March 16, 1961. The Court of Appeals for the District of Columbia, made the following comments:

> "While rushing out of Hair's home in pursuit of Blakeney, the officers passed an open door of a room in which they observed several items which fitted the descriptions of the goods stolen in the robbery. Based upon this observation, they procured the search warrant under which these goods were subsequently seized. The trial court denied Hair's pretrial efforts to suppress this evidence and overruled his objections to their admission at trial.

"We shall deal first with appellant Hair's claim that the entry into his home was unlawful. If Hair is correct, the evidence seized under the warrant issued on the basis of observations derived from that entry was erroneously admitted. Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920), Somer v. United States, 138 F. 2d 790 (2d Cir. 1943)."

Petitioner made timely objection to the introduction of all of the materials seized at his home (J.A. 43, 44), and argues to this Court that admission of these materials constituted reversible error, even though the seized materials were admitted only as to the first count of the indictment which charged a conspiracy to violate the obscenity statutes. This is so, because the volume and quantity of the seized evidence was so great that it literally overwhelmed the petitioner's defense and tended to prejudice the minds of the jurors against the petitioner. The United States Court of Appeals for the District of Columbia heard full argument on this point but in the decision and opinion of that Court the question of the violation of the petitioner's Constitutional rights was sidestepped.

III

Petitioner argues to this Court that he was denied his Constitutional rights under the Fifth and Sixth Amendments to the Constitution of the United States of America, when the District Court prohibited the petitioner from proving to the jury what matter would constitute "contemporary community standards" in the District of Columbia, when materials (Dfts. Ex. for Iden. Nos. 3 through 8A through 8H) were offered in evidence, through the testimony of a qualified psychologist (J.A. 77, 78). Petitioner offered exhibits that are comparable and similar to the petitioner's books which the Government claimed were obscene and the offered exhibits are in unquestioned circulation in the District of Columbia (J.A. 78, 79).

Further, petitioner argues that the District Court erred in refusing to allow petitioner's expert witness to testify as to his opinion on the obscenity or non-obscenity of petitioner's books and other materials, with the application of contemporary community standards (J.A. 73 through 77), when petitioner's expert witness was fully qualified to testify in that

particular field (J.A. 71, 79). Petitioner relies upon the concurring opinions of Mr. Justice Frankfurter and Mr. Justice Harlan, in Smith v. California, 80 S. Ct. 215; 4 L. Ed. 205; 361 U.S. 147. Mr. Justice Frankfurter stated, at page 160:

> "The second constitutional infirmity urged by appellant is the inclusion of appropriately offered testimony through duly qualified witnesses regarding the prevailing literary standards and the literary and moral criteria by which books relevantly comparable to the book in controversy are deemed not obscene. This exclusion deprived the appellant, such is the claim, of important relevant testimony bearing on the issue of obscenity and therefore restricted him in making his defense . . ."

At page 164:

> "The uncertainties pertaining to the scope of scienter requisite for an obscenity prosecution and the speculative proof that the issue is likely to entail, are considerations that reinforce the right of one charged with obscenity -- a right implicit in the very nature of the legal concept of obscenity -- to enlighten the judgment of the tribunal be it the jury, or as in this case the judge, regarding the prevailing literary and moral community standards and to do so through qualified experts. It is immaterial whether the basis of the exclusion of such testimony is irrelevance or the incompetence of experts to testify to such matters. The two reasons coalesce, for community standards or the psychological or physiological consequences of questioned literature can as a matter of fact hardly be established except through experts. Therefore, to exclude such expert testimony is in effect to exclude as irrelevant evidence that goes to the very essence of the defense and therefore to the constitutional safeguards of due process. The determination of obscenity no doubt rests with judge or jury. Of course the testimony of experts would not displace judge or jury in determining the ultimate

question whether the particular book is obscene, any more than experts testifying to the state of the art in patent suits determine the patentibility of a controverted device. There is no external measuring rod of obscenity. Neither, on the other hand, is its ascertainment a merely subjective reflection of the taste or moral outlook of individual jurors or individual judges. Since the law through its functionaries is 'applying contemporary community standards' in determining what constitutes obscenity, Roth v. United States, 354 U.S. 476, 489, it surely must be deemed rational, and therefore relevant to the issue of obscenity, to allow light to be shed on what those 'contemporary community standards' are. Their interpretation ought not to depend solely on the necessarily limited, hit-or-miss, subjective view of what they are believed to be by the individual juror or judge. It bears repetition that the determination of obscenity is for juror or judge not on the basis of his personal upbringing or restricted reflection or particular experience of life but on the basis of 'contemporary community standards' . . . Unless we disbelieve that the literary, psychological or moral standards of a community can be made fruitful and illuminating subjects of inquiry by those who give their life to such inquiries, it was violative of 'due process' to exclude the constitutionally relevant evidence proffered in this case . . . For the reasons I have indicated I would make the right to introduce such evidence a requirement of due process in obscenity prosecutions."

Mr. Justice Harlan at page 172:

"In my opinion this conviction is fatally defective in that the trial judge, as I read the record, turned aside every attempt by appellant to introduce evidence bearing on community standards. The exclusionary rulings were not limited to offered expert testimony. This had the effect of depriving appellant of the opportunity to offer any proof on a constitutionally relevant issue. On this ground

I would reverse the judgment below, and remand the case for a new trial."

Petitioner realizes that this point was raised to this Court in Womack v. United States, 365 U.S. 859 and the petition there denied, however petitioner urges the Court to grant this petition and conclusively settle this vital question of trial procedure in future obscenity prosecutions. If a defendant charged with violation of the obscenity statutes has a constitutional right to defend himself, as any other person charged with any other crime in the United States, then this Court should grant the Writ herein, and forever settle for the Courts below this vexing problem which the Courts below have unanimously overlooked.

IV

Petitioner argues to this Court that he was denied in any way from showing to the jurors that his materials were not obscene. Petitioner through two qualified artists (J.A. 120, 126) attempted to illustrate the use of text and photographs of petitioner's books but was not allowed by the Court below to demonstrate to the jurors (J.A. 124, 160) how the jurors were to decide whether or not petitioner's books had any socially redeeming value. Roth v. U.S., 354 U.S. 476. We cannot assume that any of the twelve jurors had any interest in drawing or art instruction so that they would have personal knowledge of the use of petitioner's materials. Further, petitioner argues to this Court that the Trial Court interfered with the defense of this case by insulting one of petitioner's expert witnesses. (J.A. 104, 107 through 115). This witness was of prime importance to the defense, since this witness, an ordained Minister of the Gospel, was possibly the only witness whom the Trial Court would permit to testify as to "contemporary community standards" in relation to petitioner's materials (J.A. 163). Through this action of the Trial Court, petitioner lost a vital and important witness (J.A. 107 through 115), thereby resulting in prejudice to the petitioner, and a further denial of his constitutional right to a fair trial.

Petitioner argues to this Court that the Trial Court committed error in refusing to grant the requested instructions that petitioner's materials were to be judged by their

effect upon average normal adult readers and not upon their effect on children or particularly susceptible groups (J.A. 221, 222). Throughout the instructions to the jury, the Trial Court demonstrated its personal prejudice by advocating the government's theory that petitioner's photographic illustrations were seemingly depicted in lewd and lascivious positions with emphasis on the genital regions (J.A. 81, 82, 230, 243). Further, the Court instructed the jurors that the petitioner could be convicted even though he believed the material he placed in the mail was not obscene, and even though he acted upon advice of legal counsel that his actions were not in violation of law (J.A. 232). Petitioner argues that this interpretation of the law is archaic and contrary to the ruling of this Court in the case of Smith v. California. Petitioner argues to this Court that a man cannot knowingly commit a crime that he does not know, or believe, he is committing, without intending to do an unlawful act.

Throughout the presentation of the government's case, the Court permitted testimony that petitioner's materials were sent and received without solicitation from some of the recipients. The Court prohibited the petitioner from in any way proving to the jurors that he was engaged in legitimate enterprise (J.A. 81, 82, 179 through 181; Dfts. Ex. for Iden. Nos. 11, 12A through 12H). In this manner, the petitioner was unable to overcome the prejudice built up against him when the Government was presenting its evidence. If petitioner had been allowed to prove the legitimate uses for his books and other materials, they would have been viewed in an entirely different light by the triers of the facts.

From the very outset of this case, the Trial Court took the view that petitioner's materials were obscene, without the Trial Court giving any consideration to the text of the books (J.A. 219).

The Court denied petitioner's request for instructions to the jurors that if his books expressed a thought or idea containing the slightest amount of socially redeeming value, they could not be held to be obscene. This requested instruction follows this Court's opinion in the case of Roth v. United States, 354 U.S. 476, at p. 484. The jurors, in following the Court's instructions as they were bound by oath to do, could not fairly and impartially decide the issue of obscenity in this trial.

V

At the outset of this Trial, counsel for the government in his opening statement outlined the theory of this prosecution that each of the alternate substantive counts of the indictment charging a mailing of obscene material was made in response to prior advertisement of where, how and from whom obscene material could be obtained, made in the prior alternate substantive count charged. When the government presented its evidence, it then became the government's position that the advertisements themselves were the basis of, first, a charge that the petitioner mailed from the District of Columbia advertisements stating where how, and from whom obscene material could be obtained, and also that the same advertisement constituted the alleged obscene material. Petitioner's placing each envelope in the mail if same contained obscene material, constituted a separate offense in violation of one section of the United States Code, to wit, Title 18 U.S. Code 1461, not 2, 3, 4, or 50 violations of that section of the Code. Petitioner argues to this Court that the Court below should have granted his motion for judgment of acquittal on all the alternate substantive counts of the indictment and failure to do so prejudiced the petitioner's trial and constituted reversible error; the offense consists of the mailing of the envelope regardless of what type of material was therein contained. We cannot separate a drawing on the top of a piece of paper from textual advertisements on the bottom of a piece of paper and contend that the one piece of paper constitutes two different things, and two different violations of the same statute.

Conclusion

Considering all of the foregoing, right from the outset of this case, petitioner did not receive a fair trial, as provided in the Fifth and Sixth Amendments of the Constitution of the United States and petitioner was denied the protection of the First Amendment to the Constitution of the United States of America, as recently interpreted by this Court in Roth v. United States, wherein this Court clearly defined obscenity, fully and thoroughly. The ambit of the statute, Title 18 U.S. Code, Section 1461, cannot constitutionally

be broader than this Court's definition of obscenity but does that also mean that an American citizen charged with violation of the obscenity statutes is stripped of all constitutional rights? Is he such a heinous wrongdoer that he should be denied a fair trial? If there is no fair trial there is no trial. If this be true then why put the Courts to the trouble, and the Government to the expense, of affording him a trial at all; surely it would have been much less trouble to bypass a trial herein and deprive the petitioner of forty-five months of his liberty. In effect, this end was accomplished. For this Court to allow this conviction to stand, then no American's liberty is secure and therefore, upon consideration of all of the points raised in this petition, petitioner respectfully urges this Court to reverse the judgment of the Court below.

Respectfully submitted,

STANLEY M. DIETZ

210 C Street, N.W.
Washington, D. C.

Attorney for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

No. 16194

Alfred J. Heinecke, Appellant

v.

United States of America, Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Decided July 27, 1961

Mr. Stanley M. Dietz for appellant.

Mr. Donald S. Smith, Assistant United States Attorney, with whom Messrs. David C. Acheson, United States Atttorney, and Carl W. Belcher, Assistant United States Attorney at the time the brief was filed, were on the brief, for appellee. Mr. Oliver Gasch, United States Attorney at the time the record was filed, also entered an appearance for appellee.

Before Bazelon, Fahy and Bastian, Circuit Judges.

Fahy, Circuit Judge: The appeal is from convictions on twenty-eight counts of an indictment containing thirty-five counts charging violations of the obscenity statutes.

The convictions were on the following counts: (a) count 1, charging conspiracy with another in violation of 18 U.S.C. §371 (1958) to violate 18 U.S.C. §1461 (1958) and 22 D. C. Code §2001 (1951), prohibiting respectively the transmittal of obscene matter through the mails and the printing of obscene matter or material stating by what means obscene matter may be obtained; (b) even-numbered counts 2 through 28, inclusive, charging violations of 18 U.S.C. §1461 by the knowing use of the mails for the delivery of non-mailable matter, that is, information as to where, how, and from whom, and by what means obscene matter could be obtained; (c) odd-numbered counts 3 through 29, inclusive, also charging violations of 18 U.S.C. §1461 by the knowing use of the mails for delivery of nonmailable matter, that is, certain envelopes containing obscene matter; and (d) count 35 charging a violation of 22 D.C. Code §2001 in the printing of or causing to be printed pamphlets and notices stating by what means obscene matter could be obtained. [1]

The sentences were fifteen months to three years and nine months on the counts under sections 371 and 1461, and one year on count 35, all to run concurrently.

Appellant contends that the convictions cannot stand because of the inclusion of the language we italicize in the following portion of the court's charge to the jury:

> As I have indicated to you, the issues of fact and the question of obscenity as an issue of fact are for you to determine and solely for you. As I indicated to you before, the law authorizes the Judge to express an opinion on any specific issue of fact. If he does so, this opinion is not binding on the jury. While it is my opinion that this material, that is, the material charged in the indictment, is actually obscene in the eyes of the law, I repeat that my opinion is not binding on you, you have a right to disregard it or not, as you choose. The issue is for you to decide, and not for me, and you are not bound by my opinion. The final decision must be

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[1] Counts 18, 19, 30, 31, 32 and 33 of the indictment were dismissed at trial. Count 34 did not involve appellant.

yours. That is your function and your responsibility.

Appellant's claim is that the statement objected to was tantamount to a directed verdict of guilty which is beyond the province of a trial judge. United Bhd. of Carpenters v. United States, 330 U.S. 395, 408, Sullivan v. United States 85 U.S. App. D.C. 409, 178 F.2d 723. We disapprove the challenged statement but do not think it constitutes such a trial imperfection, considering the charges as a whole, as calls for reversal.[2] The charge of the judge left the issue of obscenity for the jury to decide. The jury was emphatically instructed, both before and after the remark, that obscenity was a matter for their determination and that, while the judge might comment on the evidence his comments or opinions were in no way binding on the jury.[3] It is well settled, at least in some circumstances, that it is proper

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[2] We note that it had to do with the issue of obscenity and not, as appellant asserts, with the ultimate issue of guilt, as to which the trial judge made no comment.

[3] The care with which the trial judge charged the jury on the question of the right of the jury to be the sole judges of the facts, including the issue of obscenity as he had charged, is illustrated by the following excerpts from the judge's charge:

> [T]he jury decides the facts. You, ladies and gentlemen of the jury, are the sole judges of the facts and you must determine the facts yourselves on the basis of the evidence and solely on the basis of the evidence introduced at this trial.
>
> The Court's summary of the evidence, the Court's discussion and comment on the facts and on the evidence and the Court's opinion as to any issue of fact are not binding on you, they are intended only to help you, and you need attach to them only such weight as you deem wise and proper and as you desire. If your recollection or your understanding or your view of the evidence or your opinion on any issue of fact differs from the Court's recollection, the Court's understanding, or the Court's view or the Court's opinion, then it is your recollection, your understanding, your view and your opinion that must prevail because, I repeat, the final decision on the facts is solely within your domain, my instructions are binding on you only as concerns the law. As some of the books say, the Judge instructs the jury as to the law but only advises them as to the facts.

for the trial judge to comment on the evidence. United States v. Muraock, 290 U.S. 389, 394; cf. Starr v. United States, 153 U.S. 614, 626.[4]

The appellant also contends that it was error to overrule his motion to suppress certain evidence, later introduced at the trial, obtained by searches and seizures conducted at his home at Lakewood, New Jersey, with the aid of two search warrants. More specifically, the contention is that the first warrant of December 6, 1960, was invalid, and that the second warrant, of December 7, 1960, having been issued on the basis of information obtained through use of the invalid first warrant, was also ineffective to render admissible the evidence secured through its use. But the evidence obtained by the searches and seizures was not used with respect to the counts charging delivery of obscene matter under section 1461. The convictions on those counts were supported by evidence of obscene matter actually sent through the mails to various individuals. Since the sentences imposed on these odd-numbered counts, based on section 1461, are concurrent with the sentences imposed on the remaining counts, the judgment should be affirmed, without the necessity of passing upon the validity of the convictions under other counts of the indictment. Hirabayashi v. United States, 320 U.S. 81. This principle may be said to be especially applicable here; for no motion under Fed. R. Crim. P. 14 was made prior to trial for severance and none after trial claiming prejudice growing out of the fact that the offenses charged in the several counts were tried together. Moreover, no contention was made in

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4 We note, in addition, that in Womack v. United States, ___ U.S. App. D.C. ___, ___ F.2d ___, decided January 12, 1961, cert. denied, 365 U.S. 859, this court had occasion to consider photographs similar to those here in evidence and held, in effect, that they were obscene as a matter of law:

> The photographs which are exhibits in this case are conclusive autoptical proof of obscenity and filth.
>
> . . .
>
> In the case at bar the photographs were filthy, self-evidently and indisputably. We think that photographs can be so obscene — it is conceivably possible that they be so obscene — that the fact is incontrovertible. These photographs are such.

in the District Court, and none has been made in this court, by appellant's experienced counsel, of prejudice due to the possibility of evidence introduced on any one count adversely affecting appellant with respect to any other count. The evidence was introduced to support the count with regard to which it was offered, and in like manner was inspected by the jury. In the court's charge to the jury the offenses set forth in the indictment were classified into several groups and the jury was advised as to what evidence the government had offered in support of the counts within a group. And, finally, the sentences were imposed separately under each count.

We have considered appellant's other contentions and find in them no error requiring reversal.

Affirmed.

STATUTES

CONSTITUTION OF THE UNITED STATES

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

18 UNITED STATES CODE

§1461. Mailing obscene or crime-inciting matter.

Every obscene, lewd, lascivious, or filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character; and —

Every article or thing designed, adapted, or intended for preventing conception or producing abortion, or for any indecent or immoral use; and

Every article, instrument, substance, drug, medicine, or thing which is advertised or described in a manner calculated to lead another to use or apply it for preventing conception or producing abortion, or for any indecent or immoral purpose, and

Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, or where or by whom any act or operation of any kind for the procuring or producing of abortion will be done or performed, or how or by what means conception may be prevented or abortion produced, whether sealed or unsealed; and

Every letter, packet, or package, or other mail matter containing any filthy, vile, or indecent thing, device, or substance; and

Every paper, writing, advertisement, or representation that any article, instrument, substance, drug, medicine, or thing may, or can, be used or applied for preventing conception or producing abortion, or for any indecent or immoral purpose, and

Every description calculated to induce or incite a person to so use or apply any such article, instrument, substance, drug, medicine, or thing —

Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

Whoever knowingly deposits for mailing or delivery, anything declared by this section to be nonmailable, or knowingly takes the same from the mails for the purpose

of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

The term "indecent", as used in this section includes matter of a character tending to incite arson, murder, or assassination. (June 25, 1948 ch. 645, §1, 62 Stat. 768, eff. Sept. 1, 1948.)

§371. Conspiracy to commit offense or to defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximun punishment provided for such misdemeanor. (June 25, 1948, ch. 645, §1, 62 Stat. 701, eff. Sept. 1, 1948.)

22 DISTRICT OF COLUMBIA CODE

Ch. 20. — Indecent Publications.

§22-2001. Definition and penalty.

Whoever sells, or offers to sell, or give away, in the District, or has in his possession with intent to sell or give away or to exhibit to another, any obscene, lewd, or indecent book, pamphlet, drawing, engraving, picture, photograph, instrument, or article of indecent or immoral use, or advertises the same for sale, or writes or prints any letter, circular, handbill, book, pamphlet, or notice of any kind stating by what means any of such articles may be obtained, or advertises any drug, nostrum, or instrument intended to produce abortion, or gives or participates in, or by bill, poster, or otherwise advertises, any public exhibition, show, performance, or play containing obscene, indecent, or lascivious

language, postures, or suggestions, or otherwise offending public decency, shall be fined not less than fifty dollars nor more than five hundred dollars, or imprisoned not more than one year, or both. (Mar. 3, 1901, 31 Stat. 1332, ch. 854, §872.)

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In the Supreme Court of the United States

OCTOBER TERM, 1961

ALFRED J. HEINECKE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General,

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 1a-5a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 27, 1961. The petition for a writ of certiorari was filed on August 18, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court erred in expressing an opinion, fully qualified that it was only advisory, that the material in question was obscene.

2. Whether the court was correct in excluding books and magazines available to the public, proffered by petitioner to show community standards, and in refusing to admit testimony of a psychiatrist and a psychologist on the issue of community standards.

3. Whether it was proper to charge petitioner with two separate offenses, mailing obscene matter and mailing information as to where and from whom obscene matter could be obtained, arising out of a single act of mailing.

4. Petitioner also raises, although the court of appeals found it unnecessary to consider, the question of whether evidence obtained under a search warrant (relating only to counts not necessary to support the judgment) should have been suppressed.

STATUTES INVOLVED

18 U.S.C. 1461 provides in pertinent part:

> Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and—
>
> * * * *
>
> Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, * * *.

Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.

* * * *

22 D. C. Code 2001 provides as follows:

Whoever sells, or offers to sell, or give away, in the District, or has in his possession with intent to sell or give away or to exhibit to another, any obscene, lewd, or indecent book, pamphlet, drawing, engraving, picture, photograph, instrument, or article of indecent or immoral use, or advertises the same for sale, or writes or prints any letter, circular, handbill, book, pamphlet, or notice of any kind stating by what means any of such articles may be obtained, or advertises any drug, nostrum, or instrument intended to produce abortion, or gives or participates in, or by bill, poster, or otherwise advertises, any public exhibition, show, performance, or play containing obscene, indecent, or lascivious

language, postures, or suggestions, or otherwise offending public decency, shall be fined not less than fifty dollars nor more than five hundred dollars, or imprisoned not more than one year, or both.

STATEMENT

After a jury trial in the United States District Court for the District of Columbia, petitioner was convicted on twenty-eight counts of advertising and mailing obscene matter.[1] He was sentenced to imprisonment for one year on count 35 of the indictment and for a period of fifteen to forty-five months on each of the remaining counts, all sentences to be concurrent (J.A. 253). The court of appeals affirmed.

There is no dispute as to the fact that petitioner sent through the mails advertisements for a four-volume booklet entitled "Basic Approach to Drawing

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[1] The indictment, consisting of thirty-five counts, was returned against petitioner and Herman L. Womack. Count 1 charged conspiracy to violate 18 U.S.C. 1461, mailing of obscene matter, and 22 D.C. Code 2001, possession, etc., of such matter. The even-numbered counts of the indictment, 2 to 32, charged mailing of information as to how obscene matter could be obtained, a different recipient being named in each count. Each of the odd-numbered counts, 3 to 33, charged mailing obscene matter to the recipients named in each preceding count. Count 34 related solely to defendant Womack. Count 35 charged that during the approximate period of August 15 to November 10, 1960, within the District of Columbia, petitioner and Womack knowingly printed certain letters and pamphlets stating how obscene books and pictures could be obtained (J.A. 1-11). At the beginning of the trial, the government dismissed counts 18-19 and 30-33, inclusive (Pet. 2a).

the Nude," together with samples of photographs from the booklet. On behalf of petitioner, Dr. Albert Ellis, a psychologist, testified from his examination of the various exhibits that, taken as a whole, they would not appeal to the prurient interest of the average person (J.A. 85-86). In his opinion, they might appeal to some homosexuals, but not to the average man (J.A. 86-87). Nor did he think that they would excite unwholesome sexual thoughts in boys sixteen to nineteen years of age, expressing the view that any boy who would send for the booklet would not be an average American boy (J.A. 87-88). The court refused to permit this witness to testify as to what community standards were, holding that his qualification as an expert in that field had not been established (J.A. 70-71). The court also excluded books offered by petitioner that were claimed to be comparable in content to the material here in question, holding that the mere fact that such books were in general circulation would not establish that they met community standards (J.A. 89-90).

Dr. Ilsley Boone, an eighty-two year old former Baptist minister, also testified on behalf of petitioner (J.A. 101). He stated that he published certain nudist magazines and that for twenty-five years he had been the active leader of the nudist movement (J.A. 103-104). The court sustained a government objection to his qualification as an expert on contemporary standards of morality and literature (J.A. 104). Thereafter, petitioner's counsel asked leave to withdraw the witness, who felt that both he and the nudist movement had been insulted, although

counsel did not know what the court had said to cause this feeling (J.A. 107).[2] Subsequently counsel withdrew the motion to withdraw the witness but refrained from asking him any further questions (J.A. 115).

Dr. Frank J. Fagan, Jr., a psychiatrist, testified after examining a number of photographs and booklets offered by petitioner to subscribers that they would not appeal to the prurient interest of the average person (J.A. 134). He expressed doubt as to certain exhibits, but later gave his opinion that none of the exhibits would appeal to the prurient interest of the average person (J.A. 141-144). There was also testimony by the artist who had prepared the text of the four-volume booklet as to its value for purposes of instruction (J.A. 120-126) and by another artist as to the value of such photographs in making art restorations (J.A. 126-128).

ARGUMENT

1. In its charge, the court said (J.A. 234):

> As I have indicated to you, the issues of fact and the question of obscenity as an issue of fact

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[2] The court said with respect to Dr. Boone's qualification (J.A. 104): "I am going to sustain the objection. You see, I don't question the Doctor's ability. But he is a leader of a cult, which is very much of a minority cult and which most people disapprove, and which most people consider either immoral or as consisting of people who have a mental quirk. Whether the majority or the minority is right, that is immaterial for this purpose. But certainly a person in that position isn't competent to give an expert opinion on what constitutes the community standards, because those are the majority standards."

are for you to determine and solely for you. As I indicated to you before, the law authorizes the Judge to express an opinion on any specific issue of fact. If he does so, this opinion is not binding on the jury. While it is my opinion that this material, that is, the material charged in the indictment, is actually obscene in the eyes of the law, I repeat that my opinion is not binding on you, you have a right to disregard it or not, as you choose. The issue is for you to decide, and not for me, and you are not bound by my opinion. The final decision must be yours. That is your function and your responsibility.

At various points in his charge the trial judge made clear that it was the function of the jury to determine the facts and that his duty in that regard was wholly advisory: "In addition to instructing the jury as to the law, the Court has a still further function to perform in connection with the jury, and that is to summarize the evidence, to discuss and comment on the facts and on the evidence, and even to express an opinion on any issues of fact. But all this is done solely to aid and assist the jury and only for that purpose. The Court's summary of the evidence, the Court's discussion and comment on the facts and on the evidence and the Court's opinion as to any issue of fact are not binding on you, they are intended only to help you, and you need attach to them only such weight as you deem wise and proper and as you desire. If your recollection or your understanding or your view of the evidence or your opinion on any issue of fact differs from the Court's recollection, the Court's understanding, or the Court's view or the Court's opinion, then it is your recollection, your understanding, your view and your opinion that must prevail because, I repeat, the final decision on the facts is solely within your domain, my instructions are binding on you only as concerns the law. As some of the books say, the Judge instructs the jury as to the law but only advises them as to the facts." (J.A. 227-228). And again: "The

The court of appeals disapproved of the trial court's expression of opinion here, but held that it did not call for a reversal in view of other portions of the charge, which emphatically instructed the jury that the issue of obscenity was for their determination (Pet. App. 3). That decision was clearly correct, and no further review by this Court is warranted. The district court's expression of opinion, almost in passing, was not coercive. It was within permissible limits, *United States* v. *Murdock*, 290 U.S. 389, especially considering the nature of these exhibits. Cf. *Horning* v. *District of Columbia*, 254 U.S. 135.[1]

---

query is whether it was obscene, and that is for you to decide. * * * Whether the material in question is obscene within the test that the law lays down is a question of fact to be determined by you." (J.A. 232). And further: "Now let me briefly summarize the evidence bearing on these counts, and I want to repeat that what I say about the evidence is not binding on you, it is intended only to help you. Your view and your understanding of the evidence is paramount and if it differs from the Court's view or understanding, then it is your view and understanding that must prevail." (J.A. 236).

[1] With respect to similar materials involved in the case of *Womack* v. *United States*, D.C. Cir. No. 15749 (1961) (not yet reported), certiorari denied, 365 U.S. 859, the court of appeals had said: "Whatever may be the precise meanings of 'obscene' and 'filthy,' or however broad or liberal community standards may be alleged to be, the photographs presented as Government exhibits in this case are within the definitions and outside the standards. No concept of art as art could include them. No concept of community standards could permit them."

2. The question as to exclusion of magazines and limitation of the testimony of petitioner's expert witnesses is the same as that presented in Hoosier v. *United States*, D.C. Cir. No. 15749 (1961) (not yet reported), certiorari denied, 365 U.S. 859. The issue is fully discussed in our brief in opposition in that case, No. 717, October Term 1960 (at pp. 7-10). The court here permitted the witnesses to testify fully with respect to all points except community standards, as to which their qualifications to give an opinion were not established.

3. The contention that there was duplication in the odd and even counts of the indictment based on the same mailings (one group based on the advertising matter and the other on the obscene materials enclosed) presents no issue requiring resolution since the sentences are concurrent. The conviction on any one count alone sustains the sentence. *See Hirabayashi v. United States*, 320 U.S. 81, 85.

4. Prior to trial, petitioner unsuccessfully moved to suppress as evidence all property seized from his home on December 7, 1960, on the ground that the warrants were issued without probable cause and that the search was "evidentiary" (J.A. 14-15). The warrant for the original search was based upon an affidavit of a postal inspector dated December 6, 1960, which stated that he had reason to believe that on specified premises in Ocean County, New Jersey, there was being concealed an obscene booklet entitled "Basic Approach to Drawing the Nude," volumes 1 to 4, together with obscene photographs and negatives and an advertising pamphlet stating

how said materials could be obtained; that he had made purchases through the mail of advertising matter and obscene photographs from A. Heinecke, who, to his personal knowledge, resided at said address and who was the editor and publisher of said booklet; that the envelope in which such matter was mailed contained the return address of petitioner (J.A. 249-50). The return to the search warrant showed execution on December 7, 1960, and the seizure of a large number of the described booklets, together with photographs, nude drawings, Christmas cards of a nude male and advertising material (J.A. 248). A second affidavit for search warrant, dated December 7, 1960, based on the officer's observation while executing the first warrant, was for mailing lists for the aforesaid booklet (J.A. 250-51). The warrant was issued and the mailing lists seized on December 7.

The court of appeals properly held that the question of probable cause for issuing the search warrants need not be reached, in view of the fact that the sentences on all counts were concurrent. The evidence seized had relevancy only as to counts 1 and 35, conspiracy and possession, etc., of obscene material. As to the other counts, the advertising and obscene material received through the mail that formed the basis of prosecution had been turned over to the prosecution by the recipients so that the evidence seized at petitioner's home was immaterial. In any event, as appears from a mere reading of the affidavits (J.A. 249-51), the search warrant was validly issued on probable cause, and the return (J.A.

248) shows that the seizure was of materials properly subject to seizure as obscene.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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HERBERT J. MILLER, JR.,
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BEATRICE ROSENBERG,
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Attorneys.

SEPTEMBER 1961.

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